

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION

April 15, 2005

ITEM: 16

SUBJECT: Order No. R8-2005-056 Affirming Administrative Civil Liability Complaint No. R8-2005-036 – Joe Borba, Chino, San Bernardino County

SUMMARY

Joe Borba, operator of Half and Half Dairy, is alleged to have violated Discharge Specifications A.6 and A.7 of the General Waste Discharge Requirements for Concentrated Animal Feeding Operations (Dairies and Related Facilities), NPDES No. CAG018001, Order No. 99-11. Discharge Specification A.6 prohibits disposal of manure to land unless it is allowed by separate waste discharge requirements issued by the Regional Board, and Discharge Specification A.7 prohibits the use of manure as a fertilizer in any area that may affect a groundwater subbasin lacking assimilative capacity. On March 10, 2005, the Executive Officer issued Administrative Civil Liability Complaint (ACLC) No. R8-2005-036 to Joe Borba. The maximum liability that the Regional Board could assess administratively under California Water Code (CWC) Section 13385(c) for the prohibited disposal of manure is \$980,000 for 98 days of violation. The assessment proposed in ACLC No. R8-2005-036 is \$50,000. The matter before the Regional Board is whether to affirm, reject, or modify this assessment.

BACKGROUND

General Waste Discharge Requirements For Concentrated Animal Feeding Operations (Dairies And Related Facilities) Within The Santa Ana Region, NPDES No. CAG018001 (Order No. 99-11) requires manure that has been removed from the corrals be removed from the facility within 180 days. Also, Order No. 99-11 prohibits disposal of manure to land, unless allowed by separate waste discharge requirements. In addition, the use of manure as fertilizer is prohibited in any area that may affect a groundwater subbasin lacking assimilative capacity, unless a plan that mitigates the effects of the manure has been accepted by the Executive Officer. It has been documented in the 1995 Basin Plan that the underlying groundwater quality in the Chino Basin lacks assimilative capacity for the salts contained in dairy manure.

Concurrently with the adoption of Order No. 99-11, the Regional Board adopted Cease and Desist Order No. 99-65. In part, it allowed the continuation of the application of manure to existing cultivated cropland within the Chino Basin. However, it expressly prohibited manure application to pasturelands that were not being cultivated at the time of the Order was adopted.

FINDINGS

From 1972 until 1999, Joe Borba had been operating the dairy at 14651 Grove Avenue (known as the Half and Half Dairy), solely or in partnership with Marguerite Hardisty (his daughter), under individual and general waste discharge requirements adopted by the Regional Board. On September 9, 1999, the Regional Board adopted General Waste Discharge Requirements

Order No. 99-11, and Joe Borba was authorized to discharge wastes at this dairy in the Chino Basin in accordance with the Order.

On December 3, 2004, Regional Board staff observed manure being spread on pastureland in the vicinity of Grove Avenue and Merrill Avenue. Manure that had been scraped from corrals at the Lindsey Borba Dairy (another dairy operated by Joe Borba) was being hauled to and spread on approximately 20 acres of pastureland at the Half and Half Dairy. Information obtained from the hauler indicated that approximately 700 tons of manure were hauled to the pastureland. This resulted in an average of approximately 35 tons per acre of manure applied.

Regional Board staff sent a letter to Joe Borba, dated December 9, 2004. The letter stated that use of manure as fertilizer can only occur in accordance with the requirements of Order No. 99-11 and Cease and Desist Order No. 99-65, and that manure is expressly prohibited from being used as fertilizer (or disposed of) on pastureland. This letter further explained that even if the manure were to be used as fertilizer on land that was used for growing crops, the manure was required to be applied at agronomic rates (i.e., not to exceed a maximum of 17.5 tons per acre).

On December 15, 2004, Regional Board staff observed that the land was in the late stages of being disked in order to mix the manure into the soil. Regional Board staff has not been provided with any information to indicate that any of the manure has been removed.

Prior to 1980, the land on which the approximately 700 tons of manure were spread was used for both growing corn and for the disposal of dairy wastewater. However, as a result of numerous previous discharges of dairy wastewater in violation of waste discharge requirements, Joe Borba informed Regional Board staff in 1980 that he no longer intended to grow corn on this property and that the property previously used for growing corn would be converted to pastureland and used exclusively for wastewater disposal.

In late 1980, Joe Borba constructed lagoon-type containment structures on this property and ceased growing a crop. Regional Board records indicate that this property has been used as pastureland for the disposal and containment of dairy wastewater since 1980 and that crops have not been grown on this pastureland for the last 24 years.

On March 10, 2005, the Executive Officer issued ACLC No. R8-2005-036 to Joe Borba for the prohibited application of manure to pastureland. The ACLC proposed that administrative civil liability be imposed on Joe Borba in the amount of \$50,000.

DISCUSSION

CWC Section 13385(e) specifies factors that the Board shall consider in establishing the amount of civil liability. These factors are discussed below:

1. Nature, Circumstances, Extent and Gravity of the Violation

The application of manure to the pastureland of Half and Half Dairy violated Discharge Specifications A.6 and A.7. Section 13385 (a) of CWC stipulates that a violation of waste discharge requirements shall be liable civilly. Therefore, Joe Borba is liable civilly in accordance with CWC Section 13385(a). Section 13385(c) of the CWC provides that the Regional Board may impose administrative civil liability in an amount that shall not exceed ten thousand dollars (\$10,000) for each day in which the violation occurs. In this case, the maximum amount of

liability was determined by the number of days from the date of discovery of the manure application until issuance of the Complaint.

Joe Borba is alleged to have violated Discharge Specification A.6 because this application of manure to land constitutes a disposal of manure to land that was not authorized by separate waste discharge requirements issued by the Regional Board. Joe Borba is alleged to have violated the prohibition on the use of manure as a fertilizer included in Discharge Specification A.7 of Order No. 99-11 by applying manure, allegedly as a fertilizer, in a groundwater subbasin lacking assimilative capacity (Chino Groundwater Basin) without first submitting a plan that was acceptable to the Executive Officer that mitigates the effects of that use on the underlying groundwater subbasin. The application of manure that occurred does not meet the criteria included in Cease and Desist Order No. 99-65 for determining compliance with this Discharge Specification because the manure was not applied to "existing cultivated croplands" and was, instead, applied to pastureland, which Cease and Desist Order No. 99-65 expressly excludes as an acceptable means of complying with this Discharge Specification.

To date, Joe Borba has not provided an acceptable mitigation plan for the applied manure that has already been disked into the native soil. Without mitigation, the application of manure will result in additional nitrate and non-nitrate salts that will impact groundwater in the Chino Basin.

2. Ability to Pay the Proposed Assessment

Regional Board staff has no information to indicate that Joe Borba would be unable to pay the proposed assessment.

3. Any Prior History of Violations

The Regional Board has received numerous complaints, along with observations documented by staff, of process wastewater discharges to Merrill Avenue from leaks in the containment berm serving the three dairies operated by Joe Borba that share a common boundary with the roadway (Half and Half Dairy, Joe Borba Dairy #2, and B and B Dairy). In 1982, Cease and Desist Order No. 82-244 was issued because of long-standing discharges from the inadequately built containment berm that parallels Merrill Avenue.

4. Degree of Culpability

Joe Borba is entirely culpable for the application of manure on the pastureland. He directed the manure to be hauled from Lindsey Dairy to the Half and Half Dairy pastureland.

5. Economic Benefit or Savings, if any, Resulting from the Discharge

Section 13385(e) of CWC specifies, among other things, that, at a minimum, liability shall be assessed at a level that recovers the economic benefit derived the act(s) that constitute the violation. An economic analysis was attempted to determine what benefit there might have been for the manure application on the pastureland. There is likely an incremental increased cost for hauling the manure to land owned by the Borba family in the San Joaquin Valley region of California, which has been the historical practice for this dairy, instead of to the land on Half and Half Dairy. However, those costs are likely factored into the overall costs of the Borba family hauling their own feed for cows from the San Joaquin Valley to the Chino Basin and returning with manure loads. Therefore, the incremental hauling costs for a one-way haul are difficult for Regional Board staff to assess.

RECOMMENDATION

Regional Board staff recommends that the Regional Board adopt Order No. R8-2005-056, affirming the assessment of \$50,000 specified in Administrative Civil Liability Complaint No. R8-2005-036.

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION**

IN THE MATTER OF:

**Joe Borba
Half and Half Dairy
14651 Grove Avenue
Chino, CA 91710**

**ORDER NO. R8-2005-056
FOR
ADMINISTRATIVE CIVIL LIABILITY**

The California Regional Water Quality Control Board, Santa Ana Region (hereinafter Regional Board), held a hearing on April 15, 2005 to receive testimony and take evidence on the allegations contained in Complaint No. R8-2005-036, dated March 10, 2005, and on the recommendation for the imposition of administrative civil liability pursuant to California Water Code (CWC) Section 13385 in the amount of \$50,000. The Regional Board finds as follows:

1. From 1972 until 1999, Joe Borba had been operating the dairy at 14651 Grove Avenue, solely or in partnership with Marguerite Hardisty (his daughter), under individual and general waste discharge requirements adopted by the Regional Board. On September 9, 1999, the Regional Board adopted General Waste Discharge Requirements Order No. 99-11. On September 9, 1999, Joe Borba was authorized to discharge wastes at this dairy in accordance with Order No. 99-11.
2. On December 3, 2004, Regional Board staff observed manure being spread on pastureland in the vicinity of Grove Avenue and Merrill Avenue. Manure that had been scraped from corrals at the Lindsey Borba Dairy (another dairy operated by Joe Borba) was being hauled to and spread on approximately 20 acres of pastureland at the Half and Half Dairy. Information obtained from the hauler indicates that approximately 700 tons of manure were hauled to the pastureland. This resulted in an average of approximately 35 tons per acre of manure that were spread.
3. Regional Board staff sent a letter to Joe Borba, dated December 9, 2004. The letter stated that use of manure as fertilizer can only occur in accordance with the requirements of Order No. 99-11 and Cease and Desist Order No. 99-65, and that manure is expressly prohibited from being used as fertilizer (or disposed of) on pastureland. This letter further explained that even if the manure was to be used as fertilizer on land that is used for growing crops, the manure is required to be applied at agronomic rates, not to exceed a maximum of 17.5 tons per acre.
4. On December 15, 2004, Regional Board staff observed that the land was in the late stages of being disked in order to mix the manure into the soil. Regional Board staff does not have any information to indicate that any of the manure had been removed.
5. Prior to 1980, the land on which the approximately 700 tons of manure were spread was used for both growing corn and for the disposal of dairy wastewater. However, as a result of numerous previous discharges of dairy wastewater in violation of waste discharge requirements, Joe Borba informed Regional Board staff in 1980 that he no longer intended to grow corn on this property and that the property previously used for

growing corn would be converted to pastureland and used exclusively for wastewater disposal.

6. In late 1980, Joe Borba constructed lagoon-type containment structures on this property and ceased growing a crop. Regional Board records indicate that this property has been used as pastureland for the disposal and containment of dairy wastewater since 1980 and that crops have not been grown on this pastureland for the last 24 years.
7. Section 13385(a)(2) of the CWC provides that any person who violates waste discharge requirements shall be civilly liable. Section 13385(c) provides that civil liability may be administratively imposed by a regional board in an amount not to exceed ten thousand dollars (\$10,000) per day for each day of violation.
8. On March 10, 2005, the Executive Officer issued Administrative Civil Liability Complaint No. R8-2005-036 to Joe Borba, proposing that the Regional Board impose civil liability in the amount of \$50,000 on Joe Borba for the violation cited above.
9. Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 2100 et seq.) in accordance with Section 15321, Chapter 3, Title 14, California Code of Regulations.

IT IS HEARBY ORDERED that, pursuant to California Water Code Section 13385, administrative civil liability shall be imposed on Joe Borba in the amount of \$50,000 as proposed in Complaint No. R8-2005-036 for the violation cited, payable as set forth below:

1. Joe Borba shall pay the entire amount to the State Water Resources Control Board (State Board) by May 15, 2005.
2. The Executive Officer is authorized to refer this matter to the Attorney General for enforcement.

Pursuant to CWC Section 13320, you may petition the State Board for review of this Order. If you choose to do so, you must submit the petition to the State Board within 30 days of the Regional Board's adoption of this Order.

I, Gerard J. Thibeault, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an order adopted by the California Regional Water Quality Control Board, Santa Ana Region, on April 15, 2005.

Date

Gerard J. Thibeault
Executive Officer

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION**

IN THE MATTER OF:

Joe Borba
Half and Half Dairy
14651 Grove Avenue
Chino, CA 91710

COMPLAINT NO. R8-2005-036
FOR
ADMINISTRATIVE CIVIL LIABILITY

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Joe Borba, operator of Half and Half Dairy, is alleged to have violated provisions of law for which the California Regional Water Quality Control Board, Santa Ana Region (hereinafter Regional Board), may impose civil liability pursuant to Section 13385 of the California Water Code (Water Code).
2. A hearing concerning this complaint will be held before the Regional Board within 90 days of the date of issuance of this complaint, unless you waive your right to a hearing. Waiver procedures are specified on page 3 of the complaint. If the hearing in this matter is not waived, it will be held during the Regional Board's regular meeting on April 15, 2005 at the City of Loma Linda Council Chambers, 25541 Barton Road, Loma Linda, CA. The meeting begins at 9:00 a.m. You, or your representative, will have an opportunity to appear and be heard and to contest the allegations in this complaint and the imposition of civil liability by the Regional Board. An agenda for the meeting will be mailed to you not less than 10 days before the hearing date.
3. If the April 15, 2005, hearing is held, the Regional Board will consider whether to affirm, reject, or modify the proposed administrative civil liability or whether to refer the matter to the Attorney General for recovery of judicial civil liability.
4. You are alleged to have violated Discharge Specifications A.6 and A.7 of the General Waste Discharge Requirements for Concentrated Animal Feeding Operations (Dairies and Related Facilities) in the Santa Ana Region, NPDES No. CAG018001 (Order No. 99-11), that read as follows:

A.6 "Disposal of manure to land is prohibited, unless allowed by separate waste discharge requirements issued by the Board."

A.7 "The use of manure as a fertilizer in any area that may affect a groundwater subbasin lacking assimilative capacity, including the Chino Groundwater Basin, is prohibited unless a plan, acceptable to the Executive Officer, is implemented which mitigates the effects of that use on the underlying groundwater subbasin."

Cease and Desist Order No. 99-65 states that, in determining compliance with the above Discharge Specification regarding the use of manure as a fertilizer, "Dischargers may

continue to apply manure for application to existing cultivated croplands (not pasturelands) within the Chino Basin at agronomic rates..."

5. The complaint is based on the following facts:

- A. From 1972 until 1999, Joe Borba had been operating the dairy at 14651 Grove Avenue, solely or in partnership with Marguerite Hardisty (his daughter), under individual and general waste discharge requirements adopted by the Regional Board. On September 9, 1999, the Regional Board adopted General Waste Discharge Requirements Order No. 99-11. On September 9, 1999, Joe Borba was authorized to discharge wastes at this dairy in accordance with Order No. 99-11.
- B. On December 3, 2004, Regional Board staff observed manure being spread on pastureland in the vicinity of Grove Avenue and Merrill Avenue. Manure that had been scraped from corrals at the Lindsey Borba Dairy (another dairy operated by Joe Borba) was being hauled to and spread on approximately 20 acres of pastureland at the Half and Half Dairy. Information obtained from the hauler indicates that approximately 700 tons of manure were hauled to the pastureland. This resulted in an average of approximately 35 tons per acre of manure that were spread.
- C. Regional Board staff sent a letter to Joe Borba, dated December 9, 2004. The letter stated that use of manure as fertilizer can only occur in accordance with the requirements of Order No. 99-11 and Cease and Desist Order No. 99-65, and that manure is expressly prohibited from being used as fertilizer (or disposed of) on pastureland. This letter further explained that even if the manure was to be used as fertilizer on land that is used for growing crops, the manure is required to be applied at agronomic rates, not to exceed a maximum of 17.5 tons per acre.
- D. On December 15, 2004, Regional Board staff observed that the land was in the late stages of being disked in order to mix the manure into the soil. Regional Board staff does not have any information to indicate that any of the manure had been removed.
- E. Prior to 1980, the land on which the approximately 700 tons of manure were spread was used for both growing corn and for the disposal of dairy wastewater. However, as a result of numerous previous discharges of dairy wastewater in violation of waste discharge requirements, Joe Borba informed Regional Board staff in 1980 that he no longer intended to grow corn on this property and that the property previously used for growing corn would be converted to pastureland and used exclusively for wastewater disposal.
- F. In late 1980, Joe Borba constructed lagoon-type containment structures on this property and ceased growing a crop. Regional Board records indicate that this property has been used as pastureland for the disposal and containment of dairy wastewater since 1980 and that crops have not been grown on this pastureland for the last 24 years.

6. Joe Borba is alleged to have disposed of manure to pastureland in violation of the prohibition included in Discharge Specification A.6 of Order No. 99-11 either by applying

manure to land without the intention of growing a crop, or applying manure to land in excess of agronomic rates with the intention of growing a crop.

7. Joe Borba is alleged to have violated the prohibition on the use of manure as a fertilizer included in Discharge Specification A.7 of Order No. 99-11 by applying manure as fertilizer in a groundwater subbasin lacking assimilative capacity (Chino Groundwater Basin) without first submitting a plan that was acceptable to the Executive Officer that mitigates the effects of that use on the underlying groundwater subbasin. The application of manure that occurred does not meet the criteria included in Cease and Desist Order No. 99-65 for determining compliance with this Discharge Specification because the manure was not applied to "existing cultivated croplands" and was, instead, applied to pastureland, which Cease and Desist Order No. 99-65 expressly excludes as an acceptable means of complying with this Discharge Specification.
8. Pursuant to Water Code Section 13385, those who violate any waste discharge requirement are liable civilly. As provided by Water Code Section 13385(c)(1), the Regional Board can administratively assess a civil liability in an amount not to exceed \$10,000 for each day in which the violation occurs.
9. The maximum liability that the Regional Board could assess administratively for the disposal of manure to land in violation of Order No. 99-11, in accordance with Water Code Section 13385(c)(1), is \$980,000 for 98 days of violation (from December 3, 2004 to March 10, 2005).
10. Water Code Section 13385(e) specifies factors, including economic benefit resulting from the violations, that the Regional Board shall consider in establishing the amount of civil liability. An economic analysis was performed to determine what benefit there might have been for the manure disposal. There is likely an incremental increased cost for hauling the manure to land owned by the Borba family in the San Joaquin Valley region of California, which has been the historical practice for this dairy, instead of to the land on Half & Half Dairy. However, those costs are likely factored into the overall costs of the Borba family hauling their own feed for cows from the San Joaquin Valley to the Chino Basin and returning with manure loads. Therefore, the incremental hauling costs for a one-way haul are difficult for Regional Board staff to assess.
11. Based upon the consideration of the factors specified in Water Code Section 13385, it is proposed that an administrative civil liability be imposed on Joe Borba in the amount of \$50,000.

WAIVER OF HEARING

You may waive your right to a hearing. If you waive your right to a hearing, please sign the attached waiver and return it with a check made payable to the State Water Resources Control Board in the amount of the civil liability proposed in paragraph 11 above. Send the check and waiver to:

Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3339

If you have any questions regarding this complaint, please contact Gerard J. Thibeault at (951) 782-3284, Stephen D. Mayville at (951) 782-4992, or contact the Regional Board's staff counsel, Jorge Leon at (916) 341-5180.

3-10-05

Date



Gerard J. Thibeault
Executive Officer

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION**

IN THE MATTER OF:

**Joe Borba
Operator of Half and Half Dairy
14651 Grove Avenue
Chino, CA 91710**

**COMPLAINT NO. R8-2005-036
FOR
ADMINISTRATIVE CIVIL LIABILITY**

WAIVER OF HEARING

Joe Borba, operator of Half and Half Dairy, agrees to waive his right to a hearing before the Santa Ana Regional Water Quality Control Board with regard to violations alleged in Complaint No. R8-2005-036. Joe Borba has enclosed a check or money order made payable to the State Water Resources Control Board in the amount of \$50,000 in settlement of Complaint No. R8-2005-036. Joe Borba understands that he is giving up his right to be heard and to argue against allegations made by the Executive Officer in this complaint, and against the imposition of, and amount of, the civil liability.

Date

Joe Borba